

Singh (Migration) [2020] AATA 2204 (24 January 2020)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Harmanpreet Singh
CASE NUMBER:	1803735
DIBP REFERENCE(S):	BCC2011/482567
MEMBER:	K. Chapman
DATE:	24 January 2020
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Skilled (Provisional) (Class VC) visa.

Statement made on 24 January 2020 at 3:59pm

- **CATCHWORDS**
- *MIGRATION – Skilled (Provisional) (Class VC)*
- *visa – Subclass 485 (Temporary Graduate) – bogus document or false or misleading information – skills assessment – Trades Recognition Australia advised department it has no record of applicant – no compassionate or compelling circumstances to waive requirement – decision under review affirmed*

- **LEGISLATION**
- *Migration Act 1958 (Cth), ss 65, 359, 359A, 359C,*
- *360, 363A*
- *Migration Regulations 1994 (Cth), Schedule 2, cl*
- *485.224, Schedule 4, criterion 4020*

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Hasran v MIAC [2010] FCAFC 40
Huo v Minister for Immigration and Multicultural Affairs [2002] FCA 617
Kaur v MIBP [2017] FCAFC 184
Manna v Minister for Immigration and Citizenship [2012] FMCA 28
Plaintiff M64/2015 v MIBP [2015] HCA 50
Singh v MIBP [2018] FCAFC 52
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 March 2012 to refuse to grant the applicant a Skilled (Provisional) (Class VC) visa under s.65 of the *Migration Act 1958* ('the Act').
4. The applicant, Mr Harmanpreet Singh, applied for the visa on 17 October 2011. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.485.224 of Schedule 2 to the Migration Regulations 1994 ('the Regulations') because he did not satisfy Public Interest Criterion 4020 ('PIC 4020') and there were no compassionate or compelling circumstances to warrant waiver of this criterion. The delegate determined that the applicant provided false and misleading information in his visa application by falsely claiming that he obtained a Skills Assessment from Trades Recognition Australia (TRA).
5. On 12 February 2018, the applicant applied to the Tribunal for review of the visa refusal decision providing copies of that decision and the Departmental notification correspondence dated 9 February 2018 with his application. It is apparent the Department determined that the applicant was initially incorrectly notified of the visa refusal decision. The Department therefore notified the applicant again of the visa refusal decision by its correspondence dated 9 February 2018, given to him by hand whilst he was held in immigration detention at that time. Following careful consideration, the Tribunal is satisfied that the applicant has been properly notified of the Subclass 485 visa refusal decision.
6. On 9 January 2020, the Tribunal wrote to the applicant pursuant to s.359A and s.359(2) of the Act, inviting him to comment on or respond to the following information:
 7. *"Your visa application for the Subclass 485 visa lodged on 17 October 2011 indicates that you received a Skills Assessment from Trades Recognition Australia (TRA) in the occupation of Cook dated 18 October 2010 with reference number TRA10/784196547. The Department liaised with TRA concerning the validity of the aforementioned Skills Assessment given your visa application was identified as having a link to the firm S and S Migration. On 20 December 2011, the Department was advised by TRA that they held no record of you holding such a Skills Assessment and that the TRA reference number provided in your visa application did not exist in their systems (see attached document outlining the information received by the Department from TRA)."*
8. Further, the above correspondence invited the applicant to provide the following information:

"Information concerning whether there are compelling circumstances that affect the interests of Australia, or whether there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen, that justify the granting of the Subclass 485 visa."
9. The due date for response to the above invitation was 23 January 2020. At the time of this decision no response to the aforementioned invitation, or request for an extension of time to respond, has been received by the Tribunal. Following careful consideration, the Tribunal is satisfied that its invitation pursuant to s.359A and s.359(2) of the Act was properly

despatched to the email address of the applicant which was provided with his application for review.

10. Where an applicant is invited to provide information in accordance with s.359(2) of the Act, or comments on or response to information in accordance with s.359A of the Act, and fails to do so within the prescribed period, the Tribunal may make a decision on the review without taking any further action to obtain the information according to subsection 359C of the Act. In these circumstances, the applicant is not entitled to appear before the Tribunal in accordance with subsection 360(3) of the Act. Of note, the effect of s.363A of the Act is that if an applicant has no entitlement to a hearing, the Tribunal has no power to permit the applicant to appear before it as outlined by the Full Federal Court in the matter of *Hasran v MIAC* [2010] FCAFC 40.
11. The Tribunal has carefully considered whether to afford additional time to the applicant to provide a response to the s.359(2) and s.359A invitation of 9 January 2020, or to provide further material in support of his application for review. In doing so, it has paid careful regard to the guidance in the decisions of *Huo v Minister for Immigration and Multicultural Affairs* [2002] FCA 617 and *Manna v Minister for Immigration and Citizenship* [2012] FMCA 28 where the Courts held that the Tribunal is not required to indefinitely defer its decision-making process.
12. The Tribunal has taken into account that the applicant has been aware since 9 February 2018 of the reasons for the visa application being refused. The Tribunal has also considered that the implications of not responding to its invitation of 9 January 2020 were set out in its correspondence. In these circumstances, the Tribunal considers that the applicant has had sufficient time in which to address the central issues arising in the application for review and to respond to the s.359(2) and s.359A invitation of 9 January 2020.
13. On balance, the Tribunal considers it appropriate to make its decision on the review without taking any further action to obtain the information, or to obtain the applicant's views on the information, respectively referred to in its invitation of 9 January 2020. Accordingly, the Tribunal has determined this application for review following careful consideration of the documentary material before it.
14. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in this review is whether the applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.485.224 for the grant of the visa. Broadly speaking, as is relevant to the present review, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and that
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused: PIC 4020(2).

16. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4).

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

17. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
18. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
19. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
20. The Tribunal also notes the guidance concerning these matters from the Full Federal Court in the matter of *Singh v MIBP* [2018] FCAFC 52. In particular, the Tribunal has paid careful regard to the following guidance in that decision [at 144]:

21. *"Where an issue of the proper construction or application of PIC 4020 is raised, Trivedi and Patel authoritatively state that where a visa applicant has given or caused to be given to a relevant decision-maker a document which is a "bogus document" as defined, or information that is false or misleading in a material particular as defined, to determine whether PIC 4020 is satisfied or not, it is not necessary to show knowing complicity by the visa applicant as long as the material is purposely untrue."*

22. The applicant declared in his application for the Subclass 485 visa application that he had obtained a Skills Assessment from TRA in the occupation of Cook dated 18 October 2010 with reference number TRA10/784196547. According to the Department, it was advised by TRA on 20 December 2011 that the TRA had no record of the applicant, the reference number did not exist on their systems and they had no record of him ever holding a Skills Assessment (this information is contained at folio 24 of the Tribunal's file and was provided to the applicant with the s.359(2) and s.359A invitation of 9 January 2020).
23. The Tribunal notes that it invited the applicant, pursuant to s.359A of the Act, to comment on or respond to the information provided by the TRA, however he failed to do so. The Tribunal has carefully examined the documentary evidence before it and finds no persuasive evidence to undermine the veracity of the information provided by the TRA to the Department, or to disturb the Department's conclusion that false and misleading information was provided by the applicant regarding his possession of a TRA Skills Assessment. On balance, the Tribunal places high weight upon the information provided by the TRA to the Department.

24. Following careful consideration, the Tribunal finds there is probative evidence that the applicant has given to the Minister information that is false and misleading in a material particular in relation to his Subclass 485 visa application (noting possession of a Skills Assessment is a requirement for that visa), specifically through the false claim that he possessed the TRA Skills Assessment with reference number TRA10/784196547. Further, the Tribunal is satisfied that the aforementioned information contained in the visa application is purposely untrue and its submission contains an element of deception.
25. Therefore, the Tribunal finds that the applicant does not satisfy PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

26. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
27. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
28. For the following reasons, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived. There is no contemporary evidence before the Tribunal that there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen, that justify the granting of the Subclass 485 visa to the applicant. Further, the Tribunal notes that it provided the applicant with the opportunity to provide such information in its correspondence of 9 January 2020, but he did not do so. Additionally, the Tribunal considers the nature of the information submitted by the applicant in his Subclass 485 visa application, regarding the TRA Skills Assessment, to be patently false and to reflect a flagrant disregard of Australian law by him.
29. Following careful consideration, the Tribunal finds that the requirements of PIC 4020(1) should not be waived.
30. On the basis of the above reasons, the applicant does not satisfy PIC 4020 for the purposes of cl.485.224. Further, there is no evidence before the Tribunal that the applicant satisfies the criteria for any other visa subclass within Class VC.

DECISION

31. The Tribunal affirms the decision not to grant the applicant a Skilled (Provisional) (Class VC) visa.

K. Chapman
Member